IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 53 OF 2006

Shri Chaitanya P. Audichya,
s/o. Shri Kanhaialal Audihya,
Assistant Labour Commissioner
(Central), Vasco-Goa, resident
of B-1-10, Junta Quarters, Baina,
Vasco-da-Gama-Goa,Permanent Address: Village
Dharonia, Tehsil Pirwal,
Dist. Jhalawar, Rajasthan. ..... Petitioner

Versus

STATE (CBI), through Public
Prosecutor, High Court of
Bombay, at Panaji. ..... Respondent

Mr. Nam Joshi with Ms. Shilpa Joshi and S. M. Singhbal, Advocate for the Petitioner.

Mr. S. B. Faria, Special Public Prosecutor for the State (CBI)

CORAM: N. A. BRITTO, J.

DATE: 9th November, 2006.

ORAL ORDER

Heard the learned Counsel on behalf of the petitioner/accused and the learned Special Public Prosecutor on behalf of the respondent/Complainant.

2. The petitioner who is an accused facing trial under Sections 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988, has

assailed the Order dated 23.08.2006 of the learned Special Judge, South Goa, at Margao, by which the learned Special Judge has rejected an application filed on behalf of the accused, to recall for the purpose of further cross examination, two witnesses, namely P.w.1/Chandrasekhar Bhandari and P.w.2/Shri Ranjit Singh Thakur.

3. The first witness was examined by the prosecution on 16.11.2005 and cross examination of this witness began on 01.12.2005 and continued on 01.03.2006 and was completed on 04.05.2006. The examination of the second witness took place on 30.05.2006 and the cross examination began on that day and was completed on 20.06.2006 and thereafter, the said application for their recall came to be filed on 05.07.2006, which has been disposed of by the impugned Order of the learned Special Judge.

4. The allegation against the accused was that on 30.05.2003, the accused was caught red handed while demanding and accepting a bribe of Rs.10,000/- from the Complainant i.e. the said P.w.1/ Chandrasekhar Bhandari, in the presence of independent witnesses. On behalf of the accused, it was stated in the application dated 05.07.2006, that in view of the said allegation, the accused was required to explain the possession of the said amount and for that purpose, the said Complainant was required to be cross examined further and to bring on record the necessary material in order to discharge the onus on the accused and also to explain the powder found on the fingers of the accused. It

was the case of the accused that due to oversight, the case of the accused was not properly presented in the course of cross examination of the said Complainant and the accused had also to explain as to how the money was found in the pocket of the accused.

5. Now before this Court, an affidavit has been filed by the accused and in the said affidavit, the accused has stated that during the trial, he had detailed discussions with his Counsel and had also handed over detailed instructions to enable the Counsel to put up his defence in the trial and had appraised his Counsel about the true and correct facts that had taken place on the day of the incident. Along with the reply, the accused has submitted the said instructions as well as a copy of a letter dated 10.06.2003, sent by the accused in his capacity as Assistant Labour Commissioner, to the Secretary, Ministry of Labour, Government of India, wherein the accused has sought to explain the money found with him by stating that the said Complainant along with another person had forcefully entered his house and had forcefully dropped some rupees in his pocket and threatened him.

6. The learned Special Judge in his Order dated 23.08.2006, has come to the conclusion that there are no grounds to recall the said two witnesses, who were cross examined on behalf of the accused at great length, including on the aspect of the bribe amount, which was found in possession of the accused at the time of the trap and therefore, the question of recalling the said witnesses does

not arise and any recall would amount to abuse of process of law. The learned Counsel on behalf of the petitioner/accused has submitted that although written instructions were given by the accused to the Advocate appearing on behalf of the accused, the case of the accused was not properly put to the said witnesses. Learned Counsel has submitted that in case the witnesses were recalled, no injustice would be caused to the prosecution and in case they are not recalled, then certainly injustice would be caused to the accused. Reliance has been placed on the cases of ***Mohanlal S. Soni v. Union of India and anr. (AIR 1991 S.C. 1346), Jamatraj K. Govani v. State of Maharashtra (AIR 1968 S.C. 178)*** and ***Dnyandeo Pandurang Yadav & Ors. v. State of Maharashtra(2004(3) Mh.L.J. 309).*** In the last case reference was made to the first case cited herein above, amongst others.

7. On the other hand, it has been submitted by the learned Special Public Prosecutor that presently the first witness is residing at Kerala and the second witness is residing at Mumbai. The learned Public Prosecutor has further submitted that the said two witnesses were cross examined at length by an experienced Advocate, appearing on behalf of the accused, and whatever case was required to be put to the said witnesses, has been put on behalf of the accused.

8. There is no dispute that the Court has wide jurisdiction while exercising powers under Section 311 of the Code of Criminal Procedure, 1973.

As stated by the Apex Court in ***Jamatraj K. Govani v. State of Maharashtra*** (supra), speaking through three learned Judges, the section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word '*may*' in the first part and of the word '*shall*' in the second firmly establishes this difference. As the section stands, there is no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the Court is bonafide of the opinion that for the just decision of the case, the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only, the action may equally benefit the prosecution. There are, however, two aspects of the matter, which must be distinctly kept apart. The first is that the prosecution cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly and unexpectedly. There is, however, the other aspect namely of the power of the Court which is to be exercised to reach a just decision.

9. There is no dispute that the accused was an Assistant Labour Commissioner and certainly must have been present at the time when his learned Advocate was cross examining the witnesses. The case set out before this Court in the affidavit filed, is quite different from what was stated on behalf of the accused in the application dated 05.07.2006 filed before the learned Trial Court. In case any of the written instructions given by the accused were not put forward by his Counsel to the two prosecution witnesses examined, then nothing

prevented the accused from bringing the said fact to the notice of the Counsel, who was cross examining the said witnesses. There is no dispute that the accused was being represented on the date when the said witnesses were examined/cross examined by an experienced Lawyer, which the accused had probably now changed and with the change of the Lawyer, the application for recall has been made. The accused had sufficient opportunity to put whatever case the accused had to the first witness who was examined on four occasions and the second witness, who was examined on two occasions, in a span of six months. The plea of the accused that the Advocate appearing for him did not cross examine the witnesses in the light of the written instructions given by him, does not appear to be quite convincing. In a criminal trial, it is not only the prosecution and the accused, who has a stake case. The convenience of the witnesses also is required to be taken into account. The said witnesses are now residing at Kerala and Mumbai respectively. As regards this aspect, reference could be made to a decision of the Apex Court in ***Sangram Singh v. Election Tribunal Kotah and anr. AIR 1955 S.C. 425***, wherein the Apex Court observed that when we speak at the ends of justice, we mean justice not only to the defendant and to the other side but also to the witnesses and others, who may be inconvenienced. The Apex Court observed that it is an unfortunate fact that the convenience of a witness is ordinarily lost sight of in this class of case and yet he is the one that deserves the greatest consideration. As a rule, he is not particularly interested in the dispute but he is vitally interested in his own affairs which he is compelled to abandon because a Court orders him to come to the

assistance of one or other of the parties to a dispute. His own business has to suffer. He may have to leave his family and his affairs for days on end. He is usually out of pocket. Often he is a poor man living in and out of the way village and may have to trudge many weary miles on his feet and when he gets to the Court, there are no arrangements made to him. He is not given any accommodation and when he reaches the Court in most places, there is no room in which he can wait. He has to loiter about in the verandahs or under the trees, shivering in the cold and winter and exposed to the heat of summer, wet and miserable in the rains and then, after wasting hours and sometimes days for his turn, he is brusquely told that he must go back and come again another day. Justice strongly demands that this unfortunate section of the general public compelled to discharge public duties, usually at loss and inconvenience to themselves, should not be ignored in the over all picture of what will best serve the ends of justice and it may well be a sound exercise of discretion in a given case to refuse an adjournment and permit the plaintiff to examine the witnesses present and not allow the defendant to cross-examine them, still less to adduce his own evidence. It all depends on the particular case. Although the said observations were made by the Hon'ble Supreme Court almost 45 years back and in relation to a civil case, they remain valid even today in respect of criminal cases as well. As already seen, the first witness was examined on four occasions while the second witness was examined on two occasions and both the witnesses are out of the State. The said witnesses were also cross examined by an experienced advocate appearing for the accused and only because there is now a

change of advocate who wishes to look at the case of the accused differently or from a different angle, it does not mean that the witnesses are required to be recalled for further cross examination. The accused will have ample opportunity to prove his defence through remaining prosecution witnesses or from his own, during the course of trial. Considering the facts of the case, in my view, the learned trial Court has rightly rejected the application in exercise of his discretion. The impugned Order is not revisable. This is not a fit case for exercise of extraordinary jurisdiction of Section 482 of the Code. Application is, therefore, hereby dismissed.

N. A. BRITTO. J.

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